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ABSTRACT

In Robinson V. Cahill, the New Jersey Supreme Court directed the Legislature to define the Constitutional phrase, "thorough and efficient education," and to develop a system of financing the public schools that would ensure such an education to all New Jersey citizens. As a result of this decision, equal educational opportunity can become a reality in the state. But the burden is on the Legislature. What is done there will determine in large measure how soon and to what extent that goal will be achieved. This study is intended to point out the general areas in which the Legislature should act, as well as to offer models for specific legislation to deal with the educational needs of urban schools. The first section of the study concerns the problem of defining thorough and efficient education, and the second presents some alternatives for funding. But legislative action in these areas would not be sufficien to assure the development and continuance of thorough and efficient education. Thus, the third section deals with assessment and accountability, and the fourth with corrective action. The second section provides model statutes and bills from other states. Although a number of states have made significant steps in one or more areas, the New Jersey Legislature has a unique opportunity of creating an overall approach to education. (Author/JM)

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A Report to the New Jersey Education Reform Project

MODELS FOR A LEGISLATIVE RESPONSE TO ROBINSON V. CAHILL

Prepared by

The Education Law Center, Inc.

June, 1974

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Preface

This report is based on an analysis of Robinson v. Cahill. In that decision the New Jersey Supreme Court indicated that the Legislature must act in four broad areas if it is to meet the Constitutional requirement of providing a "thorough and efficient" education to the students of this State. We have surveyed existing and proposed legislation in other states to identify statutes, bills, and proposals that can serve as models for legislation in each of the four areas. This report is an attempt to bring these models to the attention of legislators, interested organizations, and the general public.

The report is not intended as a response to any particular plan, although it refers frequently to the proposals of the New Jersey Department of Education. Indeed, it should be noted that the study was concluded before the current special session of the Legislature began; thus, none of the bills introduced there is specifically considered in this report. The models presented are, however, highly relevant to the present legislative deliberations.

This study was conducted at the request of the New Jersey Education Reform Project. Any conclusions expressed in the report are, however, those of the authors.

We wish to thank the secretarial staff of the Education Law Center for their work in preparing the manuscript of the report.

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June, 1974

Models for a Legislative Response to Robinson v. Cahill

In Robinson v. Cahill, the New Jersey Supreme Court directed the Legislature to define the Constitutional phrase, "thorough and efficient education," and to develop a system of financing the public schools that would ensure such an education to all New Jersey citizens. As a result of this decision, equal educational opportunity can become a reality in the state. But the burden is on the Legislature. What is done there will determine in large measure how soon and to what extent that goal will be achieved.

This study is intended to point out the general areas in which the Legislature should act, as well as to offer models for specific legislation to deal with the educational needs of urban schools. The first section of the study concerns the problem of defining thorough and efficient education, and the second presents some alternatives for funding. But legislative action in these areas would not be sufficient to assure the development and continuance of thorough and efficient education. Thus, the third section deals with assessment and accountability, and the fourth with corrective action.

I. Defining Thorough and Efficient Education

A threshold question is "Who should define 'thorough and efficient'?" Under Robinson, the Legislature is not permitted to leave this task to local boards of education: ". . . the State must define in some discernible way . . .[its] educational obligation . . .". (62 N.J. 473, 519, 303 A.2d 273, 297.) But the defining organ of the State could be the Legislature or it could be the State Board of Education. The Legislature has traditionally given

wide latitude to the State Board and the Commissioner of Education. So have other state legislatures; but some have taken more direct responsibility for education policy than has New Jersey's. Before comparing specific statutes, it may be helpful to consider three possible methods of defining thorough and efficient: (1) a general definition in the form of a short statement; (2) a set of goals which, when achieved, would assure thorough and efficient education; (3) a set of standards and/or requirements that embody thoroughness and efficiency. All three methods could be used in conjunction with one another. The Legislature could utilize one or more of them and the State Board could complement its efforts by using the other(s). For example, the Legislature could enact a general definition and it could delegate the responsibility for setting specific goals, standards, and/or requirements to the State Board. Or the Legislature could itself adopt goals or create detailed state standards, leaving the State Board merely to implement the standards.

The New Jersey State Department of Education has proposed (for discussion purposes, at this stage) legislation that would give it authority to define thorough and efficient. This it would do by revising Title 6 of the New Jersey Administrative Code, utilizing the first and third methods of defining set out above. (It has already used the second method; in 1972 it adopted statewide goals, which are discussed below.)

A. The General Definition.

The State Department's proposed revisions of the Administrative Code include the following general definition of thorough and efficient education:

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> . . . each person in the State of New Jersey will be provided the opportunity to achieve his full educational potential in accordance with his own unique abilities, goals and aspirations.

This definition focuses on the individual and on opportunity, as did the Supreme Court in Robinson in saying,

> The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.
> (62 N.J. 473, 515, 303 A.2d 273, 295.)

Rather than leaving it to the State Board of Education to promulgate the general definition proposed by the State Department, the Legislature could enact the definition into law. The Maryland legislature has passed a law that includes such a definition. (See Appendix I-A.) It defines the kind of education required as one "that will enable . . . [students] to function to the best of their abilities as informed citizens."

Because the New Jersey Supreme Court has interpreted the Constitutional mandate in Robinson, such a legislative restatement is not essential. Nevertheless, embodiment of the definition in a statute would be advantageous: it would put the Legislature on record as being committed to meeting the needs of the individual child, and it would facilitate the process of getting more specific legislative action.

A general definition without more would be inadequate, however. It would merely put the problem back before the courts, which would have to interpret the statutory definition.

B. Statement of Goals

A number of states have created a set of goals or are in the process of determining them. Theoretically, goal-setting could either be delegated to the State Board or dealt with via legislative enactment. However, state boards of education have generally taken the responsibility for goal-setting, as did the New Jersey State Board.

The goals adopted by the New Jersey State Board of Education include "outcome" and "process" goals. (See Appendix I-B.) Outcome goals focus on the end product: What the student learns. For example, one of the State Board's goals is for the schools to help every person in the state to "acquire basic skills in . . . communicating effectively." Process goals concern the way the educational system attempts to develop the end product. The latter, as formulated by the State Board, are closely related to the general definition of thorough and efficient proposed by the State Department of Education: they, too, focus on the individual and opportunity; for example, the schools are to "insure that all instruction bears a meaningful relationship to the needs and/or interests of students." These process goals include consideration of "input", i.e., the resources available for education; one goal, for example, is "high quality" instructional, administrative and support staffs and comprehensive guidance facilities and services.

A more detailed version of the New Jersey approach to goal setting is represented by recommended goals for elementary and secondary public education in Wisconsin. The outcomes they endorse

are more specific than New Jersey's (e.g., "comprehend ideas and facts through reading, viewing and listening"). (See Appendix I-D.)

Where goals have been enacted into law, two approaches can be delineated. A Virginia statute creates very specific goals such as graduating 70% of the pupils who enter first grade 12 years later. (See Appendix I-D.) On the other hand, the Maryland statute discussed above merely enumerates skill areas in which "adequate instruction" must be provided. (See Appendix I-A.) Legislation taking the latter approach could be dangerous: it could make the definition of thorough and efficient too limited by focussing on a few narrow skill areas.

A statement of educational goals is perhaps most useful as a means of arriving at specific standards and/or requirements. Clearly, it is not enough in itself to assure a thorough and efficient education. But the nature of the goals is important. If a Legislature thinks only in terms of "input" goals--teacher-pupil ratios, percentage of teachers with advanced degrees, availability of audio-visual equipment, etc.--the standards or requirements it sets are likely to measure input only. Such measures are no guarantee of thorough and efficient education.

Statewide goals can also assist local districts in planning, particularly if the local districts are required to set goals for themselves consistent with the statewide goals. The State Department's revision of the Administrative Code would include such a requirement. If the Legislature were to enact goals, it, too, could direct local districts to formulate consistent local goals.

C. Standards and Requirements

To ensure that all of the elements necessary to provide individuals with equal educational opportunity are included in the educational system, both specific standards and specific requirements must be set by the state, and they must concern outcomes and processes, as well as input. If thorough and efficient education means the opportunity for each individual to achieve his full potential, limited only by his own considered goals and aspirations, the educational system must provide a whole range of services to meet the exceedingly varied needs of individuals. Because abilities vary, it must provide learning opportunities for the handicapped, as well as the gifted, and it must not ignore the wide range of abilities included within the term "normal." Because environment can create overwhelming handicaps, it must provide for children who come from economically, socially, and culturally disadvantaged homes or communities and for those whose primary language is not English. It must also provide early childhood education and adult education to help people overcome such disadvantages. Because interests, goals, and aspirations vary, it must provide a wide range of curricula. The availability of programs should reflect the demand for them, so that every individual who, for example, wants to enroll in a program of vocational education can do so. A full range of guidance services is also necessary. Finally, because all people do not learn best in the same way, alternative modes of learning should be available: work-study programs in vocational education, for example, alternative schools, and so forth.

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All of these elements should be contained within the standards and/or requirements which, when met, define thorough and efficient education. Standards formulated as levels below which schools may not fall are perhaps best suited to meeting general educational needs--those common to all, or almost all, individuals. For example, because all students need to learn certain basic skills, schools might be required to meet a standard for student achievement in each of these areas. Similarly, at least many of the individual child's needs for facilities and instructional materials can be met by setting standards. However, where the needs of a particular class of children (e.g., handicapped, bilingual, disadvantaged) are involved, legislation requiring specific action to meet those needs may be necessary. The required action may include provision of programs, services, facilities, and so forth.

1. General Educational Needs

Like the other methods of defining discussed above, standard-setting can be achieved through enactment by the Legislature itself or by delegating the responsibility to the State Board of Education. The latter method is exemplified in statutes from Oregon and Florida. (See Appendices I-E and I-F.) The Oregon statute requires the State Board to set standards for all schools and enumerates some elements it should take into consideration in doing so. The Florida law merely requires each district to develop and submit to the State Board annual and long-term plans reflecting programs of not less than five years' duration to meet the educational needs of the district. Pursuant to this legislative requirement, the Florida State

Board of Education has promulgated standards for accreditation which include a visit to each school every three years by at least one member of the State Department of Education.

In New Jersey, the State Board and the Commissioner seem already to have the power to promulgate standards under N.J.S.A. 18A:4-10, 4-23, and 4-25 (although no reference to standards for facilities is made in these statutes). Pursuant to them, the Board now proposes to create an approval process (similar to accreditation) for all elementary and secondary schools via draft regulations 6:27-1.1, 6:27-3.1, and 6:27-3.2 (See Appendix I-G.) Although the proposed process has strengths, it also has major weaknesses, one of which is the timetable for approval of schools. The important components of the process-completion by each district of a self-improvement program, a visit for evaluation, and determination that the standards set out in the new regulations have been met--take place only once every ten years. This calendar contrasts markedly with that created by the Florida Department of Education, as does the provision that the evaluation visit be made under the direction of the county superintendent, rather than the State Board. Further, neither the approval process nor any other aspect of the proposed revisions of the Administrative Code sets minimum standards for student achievement at periodic intervals or grade levels. Existing statutes which give local districts the right to establish requirements for promotion are left intact. This kind of local control can be seen as another weakness in the approval process, especially given the use of "social promotions" in some districts.[1] The State

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1. Fuller treatment of this problem is found in Section III, below.

Department has, however, proposed a regulation that would require students to meet minimum competencies in order to graduate from high school. (See Appendix I-H.) Although the outcomes it includes are appropriate they should be measured or evaluated throughout the student's school years, not just prior to graduation.

Apparently to fill in a gap in the existing statutes, the State Department has also proposed legislation that would give it authority to promulgate standards for school facilities. (See Appendix I-I.) Presumably, it would then seek enactment of its proposed revisions of the Administrative Code, which include general standards for school plant and site (6:27-3.8). These provisions are not clearly tied into the ten-yearly approval process. Proposed 6:27-3.8 states,

> each building and site shall meet the State Board of Education standards, including suitable provision for the handicapped, and shall provide suitable accommodations to carry out the school's educational program.

This section refers to 6:22-4, but that sub-chapter by its terms covers only new facilities. The subchapter dealing with modernization of existing structures, 6:22-6, contains no more than a statement of needs and policy and an imprecise provision for the State Board to make a "periodic survey of the facilities of existing schools and require the elimination of deficiencies."

Much more specific guidelines are needed for existing structures. N.J.A.C. 6:22 sets out detailed standards for new school buildings, but unless huge sums are appropriated for construction

of new schools in the urban areas--an unlikely development--older buildings are the rule. To ensure urban school children adequate facilities, the Legislature or the State Board should create guidelines for existing structures analogous (although necessarily somewhat broader) to those for new buildings. That this task is feasible is apparent from the standards for kindergartens proposed by the State Board. 6:27-2.5, which applies to all schools, requires the facility to be "adequate for a kindergarten program," with no less than 36 square feet of floor space per pupil. Similar space requirements, as well as standards for lighting, toilet facilities, auxiliary spaces, and so forth could be created for existing buildings. Thus, although the Legislature should give the State Board authority to promulgate standards for facilities, it should require it to include specific standards for existing buildings, and it should require inspections after specific periods of time for the purpose of ensuring facilities necessary for a thorough and efficient education.

In contrast to states like New Jersey, where standard-setting has thus far been delegated to the State Board of Education, some state legislatures have enacted at least some standards into law. In New Mexico, for example, the State Board must, by law, evaluate at least one-third of the state's schools each year. (See Appendix I-J.) It must also prescribe minimum educational standards in specific areas, including curriculum and teacher preparation. A Wisconsin law lists a number of input standards and sets up a procedure under which schools must comply with all of them by the end

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of a three-year period. (See Appendix I-K.) The Virginia Constitution requires that standards be prescribed by the State Board, subject to revision by the Legislature. Thus, the Virginia legislature has been more involved with standard-setting than other legislatures and has enacted a detailed set of standards. (See Appendix I-D.)

2. Specialized Needs

Turning from general educational needs to the special needs of particular classes of individuals, reliance on broad statutory or regulatory standards is insufficient to ensure a thorough and efficient education. The New Jersey Legislature has implicitly recognized this principle in the past by enacting detailed legislation to ensure the education of most handicapped children. Other specialized needs of concern to urban educators could be met by legislation in the following areas: bilingual education, compensatory education, early childhood education, adult education, vocational education, and alternative education.

a. Special Education

Because of the association between physical, social, and cultural deprivation and learning disabilities, it is to be expected that the percentage of handicapped children will be greater in inner-city areas than in the population as a whole. This expectation is borne out in the urban areas of New Jersey. In Newark, for example, more than 9% of the children enrolled in the public

schools in 1972-73 were in some kind of special education program[2] (and this figure probably does not represent the percentage of school-age children who in fact need such programs). Ensuring that such children's needs are met must be one of the major concerns in urban education.

Although provision of some kind of special education for the handicapped is no longer totally at the discretion of local school districts in most states, opportunities for such children still vary widely. Only some states require a full program for them; others mandate planning only, require a petition for services, or provide only for certain disabilities. In New Jersey, the Beadleston Act (Chapter 46 of N.J.S.A. 18A) requires local districts to make provision for handicapped children. It is thus an important element in a statutory definition of thorough and efficient education, reinforcing the concept that such an education must provide the opportunity for individual children to learn to the extent of their abilities. The statute does permit an exception, however. Under N.J.S.A. 18A:46-17, children classified as neither educable nor trainable mentally retarded individuals may be excluded from the public school system. The Department of Education has now recom-

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2. Figures obtained from the Newark Board of Education's Department of Special Education show a total enrollment of 8213 in special education, but 5024 of those children were in "speech." (According to a publication of the National School Public Relations Association, "The speech impaired child is the most likely to get help," partially because of the availability of specialists in this area.)

mended that this classification be eliminated and that programs be provided for children who would have been so classified, either under the auspices of the public schools or by the Department of Institutions and Agencies. Amendment of the law to define the state's responsibility for the education of these children is important.

The State Department of Education has also recommended modification of the Beadleston Act to mandate special education programs and services to handicapped children from age three. A bill that would meet the Department's objective has been introduced in the Legislature. (See Appendix I-L.) A provision of this kind is desirable, since early identification of handicaps and provision of appropriate programs can significantly increase the child's chances of fulfilling his potential. To ensure that programs for pre-schoolers will be appropriate and effective, however, the State Department should monitor them closely, as well as provide technical assistance.

Dangers are inherent in any system that classifies children according to learning disabilities. Where hundreds of highly autonomous local districts must apply the system, as in New Jersey, the risks are greater. Experience with implementation of the Beadleston Act shows the need for protecting children from misclassification, inadequate or improper programs, stigmatization, and other abuses.[3]

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3. See, e.g., study of the Puerto Rican Congress, "The Puerto Rican Experience in Education in New Jersey."

The answer may be to do away with the rigid classes created under the Beadleston Act. Massachusetts enacted a law in 1972 which provides what is effectively one class: children with special needs. (See Appendix I-M.) It stresses the need for individualized programs and provides funds not on the basis of categories of handicapped children but for all who have any special need.

The New Jersey State Department of Education has proposed revisions of the Administrative Code which would protect handicapped children from some abuses by providing for fuller involvement of parents in the process of identification and classification of the handicapped, as well as somewhat greater accountability for personnel who are responsible for implementing the process.[4] Although the proposed revisions of the Code are commendable, consideration should be given to legislation that would protect the rights of handicapped children. Laws in both Massachusetts and California give the parents of handicapped children much more control over placement of their children in special programs than does the Beadleston Act. (See Appendices I-M & I-N.[5]) Both, for example, require the consent of the parents to the child's participation in a special education program (although under the Massachusetts law

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4. Proposed N.J.A.C. 6:28-2.2(c) provides: "Professional personnel contributing to the classification of handicapped children shall give evidence of having seen the child."

5. Note that the California law does not apply to mentally retarded children, who come under another provision of the education laws in that state.

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(Sec. 3), the parents can be overruled by a court). Both also require annual evaluation of the child's progress and program (whereas the New Jersey law requires review only once every three years[6]).

The Massachusetts law contains another significant innovation--a provision to protect children from discriminatory assignment to special education programs on the basis of sex, national origin, economic status, race, or religion. Whenever the number of children from any racial, ethnic, economic or other of these groups assigned to special education programs is substantially disproportionate from the distribution of that group in the district, the State Department of Education is required to notify the district of "its prima facie denial of equal educational opportunities." To maintain the assignments, the district must then show, at a public hearing, that the disproportion is "necessary to promote a compelling education interest of the children affected" (Sec. 6).[7] Since there have been allegations of discriminatory use of the Beadleston classification process, this legislative model should be given serious consideration.

b. Bilingual Education

In Newark alone, 16% (12,275) of the children enrolled in the public schools are Spanish-speaking. Only 2,841 of them are enrolled in bilingual programs under Title I grants in nine elementary

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6. N.J.A.C. 6:28-2.4(d).

7. The limitation on enrollment in special education programs under the California law to two percent of total district enrollment (Sec. 6752) may also be intended to prevent discriminatory use of the classification system.

schools. There is no provision for bilingual education for 293 Asian-American and 20 Indian-American children or for the apparently undetermined number of children who are neither native English-speakers nor one of the above.[8] There may also be substantial numbers of non-English speaking children who are not included in these figures because they have never been enrolled in school.

Nor are Newark's non-English-speaking children in the worst situation when compared to other districts. According to a recent study conducted by HEW, nine New Jersey districts[9] with more than 1000 non-English-speaking (Hispanic, Asian-American, and Indian-American) children lack bilingual programs for 90% of such children.

The State Department has not proposed legislation in this area; it plans to deal with the problem through the approval process. As part of this procedure, every school would have to meet educational program standards once every ten years. Among the standards would be provision of bilingual education. Under proposed N.J.A.C. 6:27-3.2 (a)8., bilingual programs would be required to

> i. provide for teaching children with limited speaking ability in their dominant language; ii. provide instruction in English as a Second Language for non-speakers of English...; and maintenance for children whose dominant language is not English.

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8. Figures from Department of Bilingual Programs, Newark Board of Education.

9. Jersey City, with 7,156 such children; Paterson, 6,127; Union City, 5,931; Hoboken, 4,454; West New York, 4,255; Camden, 3,524; Perth Amboy, 3,221; Elizabeth, 3,190.

The State Department's proposed standards would not assure a thorough and efficient education to children whose dominant language is not English. Both the programs outlined and state control over them are inadequate. Legislation is necessary in this area, and some good models are readily available. (See Appendix I-O.) Indeed, bills incorporating some of their features have been introduced in the New Jersey Legislature. New Jersey Senate Bill No. 811 (which is reproduced in Appendix I-P) is modelled after a Massachusetts statute enacted in 1971, the first legislation that required local school districts to institute bilingual programs. Senate Bill No. 811 would be improved by eliminating the three-year limitation on enrollment in a bilingual program, but it is preferable to two other bills, Assembly Bill No. 1139 and Senate Bill No. 460, both of which would limit the enrollment period even more severely (three years only for children entering the program before fourth grade; two years for children entering in grades five-eight; and one year for children entering in grades nine-twelve).

Other legislation in this area that seems worth considering is a provision in an Illinois statute that children whose dominant language is not English cannot be classified as handicapped until they have been tested in their principal language. (See Appendix I-Q.)

c. Compensatory Education

The urban areas of New Jersey will be significantly affected by that part of a definition of thorough and efficient education

which refers to the needs of disadvantaged children. In Newark alone, more than 42,000 children enrolled in the public schools are A.F.D.C. children, a classification frequently utilized in assessing the need for compensatory education. These children need specially designed programs of instruction to supplement their regular courses if they are to overcome their disadvantaged backgrounds. But supplementary formal instruction is not enough for children who also need medical, dental, and nutritional services, as well as places to study and engage in recreation, and people to provide support and encouragement. What is needed is the kind of "life support" emphasized, at least theoretically, by Head Start and Title I.[10] Otherwise, there is no real equality of opportunity for them, since they start out far behind advantaged children in all or some of these areas.

Although most reformers may be expected to agree that disadvantaged children need "life support," the question of who should provide what services is a controversial one. Many of the services that go into life support have traditionally been provided by other agencies. Although a number of advantages could clearly be gained from bringing the services together in one place, the effect on the schools of requiring them to be that place cannot easily be foreseen.

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10. The Newark Board of Education reports in its "Outline of Federal Programs for Education, Fy 1973-1974" that 22,093 children enrolled in the public schools are participants in Title I programs, which seem to be primarily instructional but do include health services.

Nevertheless, the State Department of Education has proposed a step in the direction of providing "life support" for disadvantaged children. It has recommended legislation that would provide free breakfasts and lunches to all children who need them. (See Appendix I-R.)

The State Department has also proposed revision of the Administrative Code along the lines of Title I of the Elementary and Secondary Education Act of 1965. Every local district would be potentially eligible for compensatory education funds (but none is required to apply for them). Participating districts would be required to make a comprehensive assessment of individual needs and to rank them by incidence and severity within areas of disadvantage. (This provision is similar to ESEA.) Although it is clear that the State Board (through a new Branch of Urban Education) would have control over the programs, little is provided in the proposed regulations by way of specific standards or requirements. The Branch of Urban Education would have authority to promulgate program guidelines.

One proposed regulation would follow ESEA in requiring each participating district to establish "a system-wide council composed of greater than a simple majority of parents of educationally deprived children" to "participate in program development, operation and evaluation." (6:30-6:14) Since community involvement is one of the needs in the area, this is an important provision.

However, the entire regulatory scheme proposed by the State Department may be rendered virtually meaningless for lack of funds.

Under the revised Code, state compensatory funds would be allocated to local districts according to a formula: one-half of the state average per pupil expenditure multiplied by the number of educationally deprived students identified by the local district as requiring additional educational services. Expenditures for compensatory education would thus be tied to whatever funding level the Legislature ultimately decides to provide for all students. Moreover, only districts "identified to have the greatest needs" would be selected to receive funds (proposed 6:30-3.2(c)). Even if a district were selected, there would be no guarantee that all of the children in the district who needed compensatory education would receive it. One of the provisions of the revised Code would require local districts to select "program participants" by establishing "criteria for selection...based on the incidence and severity of needs dependent on funds appropriated" (proposed 6:30-6.3(b)--emphasis added).

At several points, then the regulatory scheme ties the availability of services to appropriations. It therefore does not assure a thorough and efficient education to educationally disadvantaged children.

Rather than leaving this area to administrative regulation, the Legislature could act. An Illinois statute provides a model for legislation in this field. (See Appendix I-S.) The funding formula it sets up is similar to that proposed by the New Jersey State Department of Education in that it is tied to the average

expenditure per child in the state, but it does not make availability of funds one of the criteria for inclusion of individual children. The Illinois statute also does not require any school district to create programs of compensatory education. Perhaps the additional funds offered under such legislation would be sufficient to induce districts to set up such programs, but the possibility that some districts may ignore the funds and simply not provide supplemental programs remains. (Legislation requiring such programs might follow the lines of the bilingual education statutes, requiring creation of a program where 20 or more disadvantaged children have been identified. Under proposed 6:27-3.1 every district is to include in its educational process plan (required for state approval of the school) an assessment of each child to determine his special abilities and interests and physical, mental, emotional, and social factors which affect learning. Thus, disadvantaged children should be identified in each district where they exist.)

d. Early Childhood Education

The importance of providing learning opportunities to children at an early age is now widely recognized. Certainly if children from disadvantaged environments are to realize their full potentials, they must be given the opportunity to have educational experiences prior to kindergarten. The State Department proposals to revise the Administrative Code in this area merely create a Bureau of Early Childhood Education to develop and supervise programs. Legislation is needed to ensure that local districts move ahead in providing early childhood education for all children.

The most comprehensive model available is the California legislation. (See Appendix I-T.) This statute permits but does not require local districts to develop a master plan to restructure primary education (K-3) and to provide opportunities for children aged 3 years, 9 months. No district will be permitted to enroll such young children until the master plan, which must include a program for restructuring what are now grades kindergarten through third, has been implemented. The act provides incentives in the form of funding, which should be particularly attractive to districts with substantial numbers of educationally disadvantaged children, since they receive extra funds; the Act thus ties in with compensatory education programs.

Another approach is represented by the Florida Early Childhood Development Act of 1972. (See Appendix I-U.) Like the New Jersey State Department of Education proposal, it sets up a state office to plan, coordinate, and evaluate programs, but it goes farther, particularly in providing for grants for training personnel in early childhood education. In any case, it represents a commitment by the Legislature to early childhood education.

e. Adult/Continuing Education

The New Jersey State Department of Education has proposed legislation that would provide matching funds for approved evening school programs and pay up to two-thirds (not to exceed $15,000) of the salaries of administrators of adult/community education employed by the local districts. (See Appendix I-V.) The decision to offer adult education would still be made by the local districts (under

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18A:50-5), but approval of the Commissioner would be necessary for the programs, which could take three forms: community/adult education, high school equivalency, or classes for the foreign born providing instruction in English and the government and laws of the United States.

State control of the program would be further established by the proposed revision of the Administrative Code: a Bureau of Adult Continuing Community Education would determine the criteria under which the districts would receive aid; standards would include a comprehensive plan (which citizens would help create); and adult high schools would be visited for evaluation by a representative of the Commissioner before final approval and at least once every five years thereafter.

The proposed legislation and the revisions of the Code would create opportunities consistent with a thorough and efficient education. Its only weak point is the discretion of all districts in offering such programs. In contrast, a Connecticut statute requires boards of education in towns with populations of 10,000 or more to establish adult education programs. (See Appendix I-W.)

f. Vocational Education

The State Board has proposed revisions of the statutes covering vocational education in order to provide programs for all students who want to enroll in them. (See Appendix I-X for some of the proposals.) In addition to vocational education provided by local districts at their discretion, county-wide and state-wide

access to vocational schools would be provided tuition free. The State Board would determine the need for county vocational schools and require county boards of chosen freeholders to establish such schools within four years after receipt of the State Board's resolution. Considerable control of all vocational education would be created at the county level via coordinating councils and career education coordinators, the latter appointed by the Commissioner to serve as state employees.

The proposed legislation seems to go further to assure opportunity in this area than statutes in other states have gone. California has set up a system to create a master plan for vocational education. (See Appendix I-Y.) A Florida statute creates an apprenticeship program, an idea that is not represented in the New Jersey State Board's proposals. (See Appendix I-Z.)

g. Alternative Education

Within the area of vocational education, the State Board has proposed legislation to provide students with the opportunity for "alternation of study in school with job experience in an occupational field." (See Appendix I-AA.). This legislation would constitute an important step in creating alternative modes of education.

More is needed, however, particularly in the light of growing interest in the concept of alternative schools and opposition to them from some interest groups. Some form of enabling legislation might be sufficient at this point. A proposed statute would designate selected schools or school districts as experimental for the purpose of developing new programs. (See Appendix I-BB.) However,

provision for waiving some statutory requirements (teacher certification, for example) would improve this model act.[11]

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11. See Section IV, below, for further treatment of this subject.

II. Funding Thorough and Efficient Education

Once the Legislature has fulfilled its obligation of defining "thorough and efficient education," it must still, under Robinson, ensure that funds will be available to provide that education. The Court did not spell out how the Legislature should go about achieving this goal. It expressed doubt that a thorough and efficient system could be funded by relying on local taxation. But it did not rule out some use of local property taxes. Nor did it preclude local government from taxing itself to provide more than the "constitutionally mandated education." (62 N.J. 473, 303 A.2d 273, 298.)

Numerous studies have been made of the alternatives available to legislatures faced with the need of revamping their means of financing public education. This is an area of great complexity, as the number and length of the published analyses and proposals suggest. It is not possible in the present study to do more than indicate some of the issues that the Legislature should consider and to present a few statutory models. For a more comprehensive look at school finance legislation, a 1974 publication of the National Legislative Conference called New Programs of State School Aid is recommended. Other studies of alternatives published this year include a report to the New Jersey Education Reform Project by Berke & Sinkin, "Paying for New Jersey's Schools: Problems and Proposals" and a publication of the National Urban Coalition, "Urban Schools and School Finance Reform."

A sound approach to public education in New Jersey must include at least three elements: (1) determining the cost of a

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thorough and efficient educational system for all the children of the State; (2) raising the necessary funds in an equitable manner; and (3) ensuring that those funds are made available to and are expended by every school district to meet local educational needs.

A. Determining the Costs of Education

Traditionally, New Jersey school districts have determined their educational costs through the local budget process and have raised most of the funds locally. The Supreme Court found such a system unconstitutional in Robinson v. Cahill. There are a number of alternatives to virtually unrestricted local discretion to establish educational costs. First, the State might itself determine how much a thorough and efficient education should cost for every child in New Jersey, taking into account special annual educational cost factors, regional cost of living differences, and the cost of correcting existing educational deficiencies, and require each district to expend the requisite amount. Second, the State might establish minimum, and perhaps maximum, expenditure levels, but permit local discretion within those limits. Third, the State might determine particular cost elements (such as, for example, personnel salaries), or the State might mandate a process by which local districts must determine their costs. For example, Colorado has established a "Program Planning, Budgeting, and Evaluating System" (PPBES), which focuses on the costs of particular programs or goals (e.g., teaching reading to illiterates) rather than on costs of particular resources (salaries, books, etc.). (See

Appendix II-A.) All local school districts are required to use this system, following a manual issued by the State Department of Education.[12]

California has taken a much more tentative approach. A 1969 act created an advisory committee on program and cost effectiveness to advise the State Education Department on the worth of education projects. (See Appendix II-B.)

B. Raising Funds Equitably

The recent study by Berke and Sinkin referred to above suggests two main ways for the New Jersey Legislature to meet the Robinson mandate. The first is by full state funding. Under this approach, the State would raise and allocate to local districts all funds necessary for a thorough and efficient system of education. The second method would aim at improving the fairness and adequacy of state/local sharing of educational costs. Under both methods, there is a range of possibilities regarding the revenue-raising techniques to be used. Most states continue to rely on a combination including state income and property taxes, and perhaps local property taxes as well. Some examples follow:

1. Maryland: Senate Bill for Full State Funding

Maryland Senate Bill No. 736, introduced February 27, 1974, represents the first approach: it is designed to provide for full state assumption of the costs of local public education. (See Appendix II-C.)

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12. In New Jersey, the State Department has encouraged local boards to adopt this budgeting method, and it is in use in some districts.

Under this plan, the state would pay for the "basic current expense program," which would include two elements. First, the state would pay each county (and the City of Baltimore) an amount equal to its "basic current expenses" multiplied by the number of enrolled pupils. Each county's basic current expenses would consist of its expenditures less payments for debt service, transportation, handicapped pupil, driver education, and food services (§ 128(b)). Secondly, where this amount is less than the "maximum expenditure level"--defined as the highest basic current expense per pupil expended by any county in 1973-74, adjusted in accordance with changes in the Consumer Price Index--the state would pay the difference, phasing in the increase at one-third per year for three years (§ 128(C)).

In addition to this statewide equal per-pupil expenditure (by the end of the transitional period), state funds could be used for compensatory education (§ 100). Furthermore, the state would pay the costs of other categorical programs such as transportation, education of handicapped pupils, food services, and school construction.

The program would be funded by (1) increases in the personal graduated net income tax (from 2-to-5% rates to 3-to-11% rates) (§ 288 (a)), in the corporate net income tax (§ 288(a)), and in the franchise tax on financial institutions (new § 128A(C)), and (2) the imposition of a statewide real property tax of $1.50 per $100 of assessed valuation (§ 30A). The bill does not seem to limit

local leeway, except indirectly through the provision that teachers' salaries be paid "totally from state funds as provided in the annual budget" (§ 111).

2. Florida Education Finance Act of 1973

Florida's new school finance law creates a two-part system (See Appendix II-D.) First, each local district must levy a 7-mill tax; if this levy fails to yield the "basic student cost" per weighted pupil, the state will make up the difference.[13] The "basic student cost" is set by the legislature; for 1973-74 this amount was set at $579, of which 7% was $40.53. Secondly, the state will guarantee a minimum yield for each additional mill levy (up to 10 mills) locally imposed; this minimum yield is 7% of the basic student cost per unweighted pupil for 1973-74 and 8% thereafter.

The Florida scheme has some novel features, including an elaborate per-pupil weighting system and a cost-of-living factor. The cost-of-living differentials are to be adjusted annually by the legislature.

3. Kansas School District Equalization Act

Kansas' new school financing scheme is basically a complicated foundation program without a fixed foundation. (See Appendix II-E.) State aid equals the difference between a district's budget for operating expenses, set locally in compliance with state requirements, and a local share based on the district's ratables and personal in-

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13. Since no district now raises more than the guaranteed amount from this minimum tax levy, the question of recapture is moot, but evidently the present legislation would permit a district to keep any excess. See Grubb, NEW PROGRAMS OF STATE SCHOOL AID 52 n. 2 (1974).

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come and its relative enrollment-size(§ 72-7043). There is no non-matching state aid--i.e., aid which varies with educational needs rather than district wealth--for general purposes. However, state aid for transportation (§§ 72-7047, 72-7050) and for such categories as vocational education (§ 72-7057 et seq.) is treated separately from the regular budget.

The limitations on the permissible rate of growth of expenditures are designed to reduce the inter-district disparities over time: low-spending districts may increase expenditures by 15% per year, whereas high-spending districts are limited to a 5% annual increase (§ 72-7055).

C. Distributing Funds

Effective distribution of the needed funds is predicated not only upon a determination of how much it costs to educate a "normal" student, but also upon the cost of meeting special and capital needs. Moreover, the distribution mechanism must assure that the funds actually get where they are needed and are spent for the required purposes.

1. Special Needs

Distributing state aid on the basis of actual (or estimated) costs of a variety of special needs will equalize educational opportunity. This approach is the basis of a full-funding scheme and is also typically part of a shared-cost scheme. The funds may be allocated through the use of weighting, through categorical aid, or by a cost-of-living differential.

Florida uses an elaborate weighting system, with some 25 categories; the weights are intended to compensate for a variety of educational needs caused by such factors as age, special needs (exceptional and vocational education), and disadvantage (compensatory education). (See Appendix II-D, Sec. 4.) Local districts receive money based on the anticipated costs of the program(s) in which each student is enrolled, rather than on student classification per se. Thus, "individual student needs are made the most important part of the basic allocation formula."[14] In addition Florida requires that 90% of the funds generated by these weightings actually be used for the intended beneficiaries (Sec. 11(3)).

The Florida act also uses the categorical-aid approach, most notably to provide funds for construction (see p. 33, below). In Utah, a categorical aid program is used to support such activities as instructional media centers, extended year or day programs, community school programs, distinguished teaching salaries, and dropout prevention, as well as to provide funds for compensatory education. (See Appendix II-F.)

2. Capital Costs

Under the present New Jersey law, state aid for capital costs is severely limited. It is provided on a per-weighted-pupil basis, which may not exceed the difference between a local

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14. The Woodrow Wilson School of Public and International Affairs, Financing Education in New Jersey: An Interim Report, June, 1974, at 18. NEW PROGRAMS OF STATE SCHOOL AID points out, however, that "in Florida the form which aid for compensatory education takes--different weights in calculating the number of weighted pupils in each district--means that the amount of aid is a function of local expenditures per weighted pupil." It contrasts this method of providing such funds with the categorical aid approach used in Utah.

fair share (determined by applying a rate of .075 per $100 to the equalized full valuation of the taxing district) and $45 per weighted pupil. In 1973, an amendment to the school finance statute provided that no district should receive less building aid than it had received in 1972-73. The effect of this change was to continue aid to many districts which would otherwise have received none because their equalized valuations had increased and/or their total (weighted) enrollment had dropped.

This method of providing state aid for construction and other capital purposes is inadequate, not only because of the extremely low per-weighted-pupil figure of $45, but also because it does not permit allocation according to need. (The save-harmless amendment only compounds the inequities.) Under full state funding, this kind of formula would no longer be necessary, and the inequities would presumably be eliminated. In Maryland this result has already been achieved, although the bill requiring full state funding of all education costs has not yet been enacted. Under a statute which took effect in 1971, the local districts do not pay for school construction or capital improvements (including debt service for these projects). (See Appendix II-G.) Federal funds are utilized first and the state pays whatever excess is needed.

Another approach, in the Florida statute discussed above, should also eliminate the inequities inherent in New Jersey's state building aid program. Section 7 of the Florida act gives the commissioner of education the power to determine the school

plant needs of each district (based on elements listed in the law) and to allocate funds to each based on its needs. (See Appendix II-D.) The law also sets expenditure priorities and under certain conditions, requires the use of specified design and construction techniques (Sec. 8). It thus gives the commissioner much more control over the development of school buildings and facilities than New Jersey state education authorities have. At the same time, funding is much more flexible and equitable than in New Jersey, since it is based on overall needs.

A bill introduced in the New Jersey Senate in 1973, the "Public School Financing Act," (S. 2136) would, however, improve the situation here. Under it, all capital costs would be funded by the state. Funds would be distributed on a per-pupil basis, but capital projects designed to remedy present inadequacies would receive highest priority.

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III. Assessing Education

The Supreme Court in Robinson held the State accountable for achieving a thorough and efficient educational system. It criticized the State for not having defined the Constitutional mandate, as well as for not compelling local districts to raise enough money to fulfill it. In thus holding the State responsible for local outcomes, the Court implied that the State must continuously assess the achievements of the local districts to ascertain whether they are meeting whatever "prescription" for thorough and efficient education the State finally "spell[s] out". (62 N.J. 473, 516, 303 A.2d 273, 295.) The trial court had addressed itself to this need more explicitly, saying,

> While equalizing tax burdens may be readily accomplished by known means, it may be more difficult to assure that additional school funds will actually result in improved education.... Education must be raised to a "thorough" level in all districts where deficiencies exist.... The State Board and the Commissioner have ample statutory power to measure progress....
>
> (118 N.J. Super. 223, 281, 287 A.2d 187, 217)

A statewide program to assess pupil achievement at certain grade levels has been developed in New Jersey. (See discussion below at p. 37.) That this program will prove adequate to inform the State of any and all deficiencies in school programs is unlikely, however, particularly since it was implemented before a definition of thorough and efficient education had been formulated. The Legislature should consider passing legislation that would require the State Department and/or local districts to use other methods of measuring the progress

of the schools. Before turning to statutory models from other states, however, a brief analysis of the concept of accountability should be helpful.

A. Theoretical Bases of Accountability

Accountability in education has become a broad concept, ranging from the traditional standardized testing of school children to expert evaluation of entire school systems. Although there is disagreement over who is most responsible for educational outcomes--administrators? teachers? students themselves? parents?-- some sort of consensus seems to have developed to the effect that school administrators and teachers ought to be held responsible to some extent. As of the fall of 1972, 23 states had enacted some kind of accountability legislation, and in 16 other states bills were to be introduced during 1973.[15] Many of these statutes or proposed statutes mandate a statewide testing program. Although the laws do not always make the purpose of these testing programs clear, they are, or ought to be, means to an end: a way of finding out where the weaknesses and strengths of the schools lie, where they are succeeding or failing so far as certain specified outcomes--usually in basic skills--are concerned.

Some critics of the public schools would also hold them accountable for meeting process standards. Charles Silberman's study, Crisis in the Classroom, seems to support that view, focussing

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15. Phyllis Hawthorne, Legislation by the States: Accountability and Assessment in Education, April 1973.

as it does on the glaring inadequacies in the learning environment that exist even in well-off suburban schools. Developing assessment techniques to measure this kind of achievement is perhaps even more complex than creating sound techniques for measuring outcomes, but considerable research is in progress.[16] And some legislation taking this approach has been enacted.

B. Implementation

1. General Mandate to State Board of Education

Maryland's accountability statute is typical of laws giving state agencies the authority to require self-evaluation of the schools. This legislation requires each school to set goals and objectives, assess the needs of its students, develop programs to meet those needs, and then evaluate the programs to see how effective they are. (See Appendix III-A). The overall process is very similar to that which the New Jersey State Department of Education wants to establish.

The Commissioner already has power to conduct statewide tests under N.J.S.A. 18A:4-24, pursuant to which NJAC 6:39-1 et seq. has been promulgated by the State Board of Education. The State Board has approached this testing program as a needs assessment. It would continue to implement this approach under the proposed revisions of the Administrative Code. The new regulations would emphasize local self-evaluation, although proposed N.J.A.C. 6:36-1 et seq. provides for an Educational Planning Bureau whose duties would include approving local evaluation programs (6:36-1.3). (See Appendix III-B). N.J.A.C.

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16. E.g., papers collected by Herbert Walberg in Evaluating Educational Performance.

6:27-3.1(a)(3) sets general guidelines for local assessment, including a directive that the assessment should include "determination of special abilities and interests and physical, mental, emotional and social factors which affect learning" and a list of assessment procedures to be included in the system. Based on its needs assessment, each district is to develop an educational program which "must set forth the provisions to be made for students with special needs (handicapped, disadvantaged, gifted and non-English-speaking)." (6:36-1.2 (a)) Presumably, then, the district's self-evaluation program would include determination of the degree to which these special needs are being met by the provisions established in the educational program.

The weak link in the State Department's proposed accountability scheme is its failure, thus far, to specify outcome standards for grade levels. It may well be that the State Department will do so in the future, when the results of the statewide testing program are clear. But it may feel constrained to avoid doing so as long as one part of N.J.S.A. 18A: 4:24 remains in effect: the last sentence of that statute makes it clear that local districts have power to set standards for promotion. (See further discussion below at p.41.)

2. Specific State Legislation

a. Statewide Testing

Some states have passed laws that hold the schools responsible for at least some measureable outcomes. Florida's Educational Accountability Act of 1971, for example, requires the commissioner of

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education to establish annually basic statewide educational objectives for each grade level, including reading, writing and mathematics; to administer statewide tests to determine the degree to which these objectives are achieved; and to report the results by grade and subject area for each school district. (See Appendix III-C.) The law provides for gradual implementation of these procedures, requiring only one of the basic subject areas to be covered in the first year. A bill which would further delay the process of implementation is presently before the Florida legislature.

California also requires statewide testing, but one program takes an approach different from Florida's. It focuses on basic reading skills in primary grades and the intention is to prevent and/or correct reading disabilities. (See Appendix III-D.) Thus, the use to which the results of this testing program must be applied is clearly spelled out in the legislation, which is not the usual case.

b. Setting Standards and Performance Objectives

(1) For Administrators and for Teachers

N.J.S.A. 18A:6-75, enacted in 1971, represents a very tentative step in the direction of evaluating teacher performance. It merely gives the Commissioner authority to establish a project, enlisting the voluntary cooperation of local school districts, teacher training institutions, and professional organizations, which would develop performance criteria for assessing teaching competence prior to certification. Other states have gone much further in this direction. Virginia has enacted very specific performance objectives (although the statute refers to some

of them as "Planning and Management Standards") for administrators and teachers, spelling out the duties of superintendents, principals, and classroom teachers. The objectives for teachers are most interesting; for example, "The teacher shall provide for individual differences ... by providing different material and creating different achievement standards according to individual ability and/or past achievement and by giving the pupils opportunities to work independently on "meaningful tasks." (See Appendix I-D.)

Another approach to the accountability of school personnel has been taken in California. There the Legislature has directed each school district to develop and adopt guidelines for evaluating the performance of certificated employees and has designated elements which must be included (one of which is "the establishment of standards of expected student progress in each area of study.") Based on these guidelines, each district must adhere to basic procedures in evaluating personnel. (See Appendix III-E.)

(2) For Pupils

Educators have not yet agreed on any one approach to standard setting for students. One issue involves the kinds of standards that should be set. The Legislature or State Board could set minimum standards of achievement in any number of areas, at any number of levels; a danger in this approach is the tendency to set minimum standards by reference to "grade equivalent scores" on standardized achievement tests. Since the scores on these tests in fact represent averages, some students will always score below the minimum standard and some will always score above it. One expert has concluded that a different kind

of test must be created, directed specifically at measuring a minimum acceptable level of performance in the relevant subject matter and grade level.[17] In general, however, the setting of minimum standards suggests a rather broad approach to assessing student achievement. Another kind of standard could be utilized. Specific performance objectives could be formulated for different subjects at various levels. This kind of standard lends itself to a highly sophisticated and detailed approach; for example, achievement in 9th grade mathematics might equal mastery of a number of specific problem-solving techniques.

Another issue in standard-setting for pupils concerns the nature of the learning that should be measured. Traditionally, schools have tested students' cognitive skills, but some educators now believe that schools should be concerned with and test for the development of affective skills. A number of the states that have established goals for the schools include affective outcomes in their lists. (See, e.g., Appendix I-D.) Evaluation of the schools' attempts to fulfill these goals would seem to be necessary.

In New Jersey, although these theoretical considerations have been discussed, the debate has not eventuated in any uniform, statewide standards for pupils. The local districts have maintained control of promotion and graduation requirements.

Because of the allegedly common practice in at least some urban schools of promoting students automatically (so-called "social promotions"), some reformers suggest that statewide standards for promotion

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17. Garlie A. Forehand, Assessment, Diagnosis and Response in a Thorough and Efficient Education, 1974.

and graduation now be set by the legislature or the State Board of Education. Legislation would be required to accomplish this goal, at least where promotion is concerned. (See discussion of N.J.S.A. 18A:4-24, above, at p.38.) As to graduation requirements, the State Department of Education has recently proposed a regulation which would set "minimum competencies" for graduation. (See Appendix I-H.) Although this proposal is a step in the right direction, it hardly seems adequate to solve the problem, which originates in the promotion practices of some districts. The Florida act described above provides a better model. (See Appendix III-C.)

It should be noted that the objective behind uniform statewide standards of this kind is to hold the school system accountable by preventing it from covering up real outcomes. Student accountability is not really involved here. That concept hardly seems warranted by the circumstances of urban schools.

c. Community Involvement

Provision is usually made in statutes requiring statewide testing for some kind of publication of the results. In New Jersey a legal battle has been waged (and may continue) over such public disclosure, but the outcome thus far has been to permit publication. The State Department's proposed regulations governing self-evaluation of the schools do not speak to this issue, nor has further legislation to clarify the Commissioner's power been proposed. Such a law has been passed in Florida. (See Appendix III-F.)

Some of the provisions in the proposed regulations governing the approval process for individual schools touch on community involvement,

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thus implying that parents and other members of the community should participate in the process of making the schools thorough and efficient. For example, the first step for a school district in developing an educational process plan (required for state approval under proposed regulation 6:27-3.1) is the setting of process and outcome goals, which are to be developed through the cooperative efforts of staff, parents, community and,where appropriate, children. More specifically, the proposed revisions of the Administrative Code would provide "parent councils" for programs of compensatory education. Proposed regulation 6:30-6:14 requires each district that receives funds for compensatory programs to create a system-wide council "composed of greater than a simple majority of parents of educationally deprived children." Not only is this council to assist in development of the programs, but it is also to participate in evaluation.

Other states have taken the advisory committee approach to accountability in the school system as a whole, rather than just in one area such as compensatory education. Colorado, for example, has created an advisory committee to assist the state board in setting up an accountability program, as well as requiring local boards of education to appoint similar "advisory accountability committee(s)." (See Appendix III-G). The primary intention behind such statutes is undoubtedly to provide a means of opening up school systems to the communities they are intended to serve, to make them more readily accountable to those communities. But at the same time, laws of this kind create another level of accountability: those parents and citizens who serve on such advisory committees will also be responsible to some extent for

the outcomes of the school system. A Florida statute requiring local school boards to establish advisory committees recognizes this implication and requires the state department of education to appraise the effectiveness of committees. (See Appendix III-H.)

IV. Corrective Action

Legislation defining thorough and efficient education, establishing a mechanism to fund such an education for all children, and requiring evaluation of the results of these changes is not enough to ensure equal educational opportunity. Without an enforcement mechanism that works, the effectiveness of legislation will depend upon the voluntary compliance of local school districts. In Robinson v. Cahill, the New Jersey Supreme Court made it clear that the State must provide a thorough and efficient education to all pupils, notwithstanding "local failures"; the State must stand ready to "compel" local districts to comply with the Constitutional mandate

> ...and if the local government cannot carry the burden, the State must itself meet its continuing obligation.
> (62 N.J. 473, 515, 303A.2d 273, 297.)

There are a number of ways for the Legislature to ensure this result.

A. Present Remedies

1. Order Issued by the Commissioner

N.J.S.A. 18A:4-23 gives the Commissioner of Education power to enforce the rules and regulations promulgated by the State Board of Education. The section of the Administrative Code which spells out the Commissioner's powers states as follows:

> The Commissioner is empowered to decide legal controversies and disputes arising under school laws or State Board regulations and his decisions have the force of law.
> (N.J.A.C. 6:5-1.2(a) 1.)

It is unclear whether the Commissioner has the power to issue orders with "the force of law" where he becomes aware that a local district is violating a law or regulation but the violation has not eventuated

in a "legal controversy" involving a hearing before him. A strong argument can be made that the Legislature intended the broad language of N.J.S.A. 18A:4-23 to include such a power. And it is a matter of administrative law that administrative agencies have the power to promulgate rules and enforce them, although not necessarily without a quasi-judicial hearing.[18] In any case, the Commissioner's power to issue an order settling a controversy has been used to remedy numerous situations in which the right of individuals or groups of students to a thorough and efficient education was threatened, impaired, or denied.

2. Withholding State Funds

At present, the Commissioner also has the power to withhold state funds from districts that do not comply with state statutes or regulations of the State Board of Education. (N.J.S.A. 18A:55-2. N.J.A.C. 6:5-1.2(a) 8.)[19] But he has virtually never exercised this power,[20] and it is unlikely that he will do so in the future, since withholding state funds has an immediate adverse effect on the

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18. DAVIS, ADMINISTRATIVE LAW §5.01 (1958).

19. This power seems to presuppose the existence of authority to issue an administrative order without a quasi-judicial hearing. Several cases decided in recent years also imply that the Commissioner does in fact have such authority. See, e.g., State Board of Education v. Board of Education of Netcong, 108 N.J. Super. 564, 262 A.2d 21 (1970), aff'd., 57 N.J. 172, 270 A.2d 412 (1970).

20. In other situations where federal or state law provides for cutting off funds in the event of non-compliance, a similar reluctance to use this power has been apparent. In the case of education, as the level of state funding increases, the Commissioner's reluctance to cut off funds would also probably grow.

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education of the children of the district. The New Jersey Education Reform Project of the Greater Newark Urban Coalition has proposed in its "Memorandum No. 3: Concerning Thorough and Efficient (Draft Definition)" that the power to withhold funds be supplemented by a requirement that school districts whose state funds have been withheld nevertheless maintain their per capita expenditures on pain of a criminal penalty. Although it is probably true that no district would go so far as to risk such an outcome, theoretically it could happen, and in that event the children of the district would be denied an education.

B. Proposed Remedies

From the above discussion of the remedies that are presently available, it is clear that existing sanctions are not sufficient to carry out the mandate of Robinson. Additional remedies must be provided by the Legislature.

1. Approval Process

The State Department's proposed revision of the Administrative Code would create (in 6:27-1.1) a process whereby all schools would be subject to approval by the State Board. Although implementation of this process would improve upon the present situation, in which only secondary schools are subject to approval, it is not designed as a sanction against specific violations of the school laws or regulations. Under it, each school would have to be approved once every ten years by the State Department of Education and annually by the county superintendent of schools. The proposed Code section envisions voluntary compliance with standards set by the State Board. It provides only one repercussion for a school that is not approved:

inclusion in a published list of such schools. (Proposed N.J.A.C. 6:27-1.1(g).) Certainly school authorities will not want their schools to be on an unapproved list, but, nevertheless, this sanction is not formidable. Standing alone, it would surely not be sufficient to meet the State's constitutional obligation.

2. Sequential Responses to Violations

What seems to be needed is a set of remedies to be invoked more or less in sequence, rising from the level of informal action to institution of formal and serious sanctions by the State.

a. Informal Action

When in the course of evaluating the progress of the schools the State Department becomes aware that a district has not moved forward sufficiently toward the goal of providing a thorough and efficient education to all its students, the Commissioner should be empowered to advise the local board of education of the Department's findings and warn it that the deficiencies must be corrected within a specified reasonable period of time. At the end of that period, the action of the local board would be evaluated and approved or disapproved.

If it is found that the local board has failed to remedy the deficiencies, the Commissioner should be empowered either to reallocate specific resources within the district and/or to require teachers and other school personnel to enter inservice training programs. If the Commissioner finds that one or both of these measures would be insufficient to ensure the Constitutionally

mandated education, he would have to resort to more formal action. He might be required to obtain the approval of the State Board to move to that level of enforcement.

b. Formal Action

(1) Authorize Experimental Programs

The Commissioner should be given the power to authorize a local board to carry out innovative or experimental programs in order to improve the quality of education in the district, notwithstanding any other provisions of the education laws. Such a power would be of little use, however, unless the State Department of Education had previously been given the means to help local districts create such experimental programs.

(a) Technical Assistance and Funds for Experimentation

The State Department's proposed revision of the Administrative Code includes several provisions under which the Department would aid local districts in developing programs. The proposed creation of an office of early childhood development[21] falls into this category, as do provisions for the development of models for local programs (N.J.A.C. 6:38-1.1) and for the establishment of regional field offices of the State Department ("educational improvement centers"--N.J.A.C. 6:40-1.1) which would provide research and development support to county offices and local school districts, pursuant to an act giving the Commissioner authority to establish a system of centers for research and demonstration (N.J.S.A. 18A:6-71).

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21. See discussion in Part I, supra. pp. 21-22.

If these provisions are to be implemented in a useful way, funds must of course be available to the State Department. Funds for local districts to create experimental programs can also serve as a meaningful incentive. Proposed legislation to designate selected schools as experimental, discussed in Part I, above, is most significant in its provision of such funds. (See Appendix I-BB.) Another model for such legislation is Utah's education finance statute, which provides specific sums for experimental programs and requires that local districts submit programs for funding to the State Board of Education. (See Appendix II-F.)

Utah has also fashioned an incentive for "higher quality instruction" by providing a state contribution to districts that submit plans for improving teaching techniques. The funds are to be used to supplement the salaries of teachers who participate in innovative programs or perform "leadership services." Other states have also taken steps to provide the means to improve teacher performance. Although it is not as direct an incentive as that provided in Utah's education finance law, Florida's Teacher Education Center Act of 1973 creates a method for schools to improve the quality of their instructions. Under it, centers are to be established and funded jointly by school districts and colleges or universities. (See Appendix IV-A.) Among other functions, these centers are to provide inservice as well as preservice teacher education, to "recommend programs through which provision is made for alternative routes to certification and completion of master's degrees,"[22] and to initiate "any program determined to satisfy a need demonstrated

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22. New Jersey has taken a tentative step toward exploring this kind of provision in N.J.S.A. 18A:6-75.

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within the school district." The centers must be approved and regularly evaluated by the State Department of Education, which is also authorized to contribute funds to them for specific purposes.

Special purpose legislation in California attempts to enrich the training of teachers who work in poverty areas (See Appendix IV-B.) It makes funds available to school districts for expenses in excess of their own revenues incurred to establish preservice or inservice training programs in schools designated as "concentrated areas of poverty and social tension." The legislature sets forth specific components for 8-week programs, as well as providing for their evaluation. As in Florida, there is no provision for direct remuneration of teachers who participate in these programs. However, such programs might well provide teachers who have not been performing adequately with a means of upgrading their skills. In this way, they would tie in with the proposal of the Education Reform Project that teachers who fail to achieve a specified percentage of one year's expected growth in basic skills for their classes in each of three consecutive years be required to return to school for remedial courses. Rather than merely taking theoretical college courses, however, such teachers may well benefit more from the kind of program set forth in the California legislation: the program combines classes in, among others, psychology, sociology, and learning disabilities, with demonstration teaching, classroom observation, and home visitation. Another feature might be added to the special purpose California model. In order to reward teachers who take on assignments in districts where the percentage of disad-

vantaged children is high, the State Department of Education might be empowered to offer salary increments to them in the way that the Utah legislation provides extra pay for teachers who lead or participate in experimental programs.

(b) Suspension of Statutory and/or Regulatory Requirements.

In addition to providing funds for experimental programs, more flexibility is needed in some areas covered by existing statutes if local districts are to meet the challenge of providing thorough and efficient education. The requirements for certification of teachers, for example, may be too rigid, as well as ineffective in ensuring high quality teaching. New Jersey has taken a tentative step toward requiring evaluation of a teacher trainee's performance in the classroom before certification (N.J.S.A. 18A:6-71). Such a requirement would create a beneficial side-effect if it encouraged teacher training institutions to put more emphasis on practical experience in the classroom.

In some cases, waiver of some certification requirements would enable a school district to improve its programs. Alternative schools such as the one in Leonia have utilized the talents of local business and professional people such as journalists and sculptors to give their students training that other schools do not and could not provide with full-time certificated teachers. Use of non-certificated teachers has been and is being opposed by teacher's associations; legislation may be needed to strengthen the State Department's power to encourage such experiments, although under N.J.A.C. 6:11-3.14 the Commissioner has authority to waive certification requirements for schools with "experimental curricula."

Specific authorization for the employment of classroom aides or the use of volunteers to tutor children and perform other educational services may also be useful. Voluntary and paid aides are widely used in New Jersey, but there is no uniform set of standards governing their qualifications. The Administrative Code (6:11-4.9) essentially leaves this matter up to local districts. Ohio law defines these employees, gives the State Department power to prescribe qualifications, and sets some of their duties and rights. (Appendix IV-C.) But it also limits the number of aides who may be employed in a school to one for each six full-time certificated teachers. This feature seems to be a serious limitation on the effective use of aides. In addition to providing for paid educational aides, Ohio schools reportedly are served by an organization called Volunteers in Education, which encourages citizens to donate their time and skills to read to children, assist in school libraries, and so forth.

Suspension of some regulations governing school buildings may also be necessary to encourage districts to try new programs and teaching techniques. To establish alternative schools, for example, districts may need to utilize non-school buildings. Although safety requirements must not be suspended in any instance, the State Department should have the power to suspend some other non-vital regulations regarding facilities.

Finally, modification or suspension of regulations defining the school day and year is needed to encourage school districts to find ways of better utilizing their facilities to benefit pupils.

Massachusetts, among other states, has authorized local school districts to operate schools on a twelve-month basis if the school board so decides. (See Appendix IV-D.) Utah has gone further, providing funds for extended year, extended day, and summer programs approved by the state board. (See Appendix II-F.) The extended day concept could be very useful to older disadvantaged children who can find jobs during part of the day. But it should also encompass the use of the school during non-school hours for study and supportive activities.

In a related provision, Utah seems to be moving toward this vision of the school as an institution to serve community needs. It has allocated funds for "community school programs," supporting the idea that "the schools belong to the people," who should be involved in "determining the role the schools shall play in solving individual and community problems." (See Appendix II-F.) Florida has also made a step in this direction by providing grants for community schools. (See Appendix IV-E.)

(c) Performance Contracting

Another possibility for solving particular problems in a school district is presented by a California statute providing for performance contracting. (See Appendix IV-F.) The law puts this program on a limited and experimental basis and permits its use only in the areas of elementary reading and mathematics. According to the purposes stated in the law, it is designed, among other things, to bring the concept of "accountability for results" into the public school system, to demonstrate the effectiveness of innovative

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approaches, and to reduce future costs. Local districts apply to participate in such a program, and their plans are subject to the approval of the Superintendent of Public Instruction. One of the considerations for the Superintendent in approving plans is the "substantial chance" that the proposed program can be "transferred and duplicated by the public school system at a later date, if the special program is found to have merit."

Thus, performance contracting (under the California law at least) provides another means for local districts to experiment. As such, it can serve a useful function. Giving local school boards power to enter into such contracts (with the approval of the Commissioner or State Board) might prove beneficial to many schools.

(2) Issuance of an Administrative Order

The Legislature should make clear the Commissioner's power under N.J.S.A. 18A:4-23 to issue (perhaps with the approval of the State Board) an administrative order that would bind the local school board. Such an order could require the local board to cease improper conduct and/or specify a plan of corrective action which the local board would be required to initiate. A New York law which governs community school boards in New York City gives the chancellor power to issue such an order "after efforts at conciliation have failed." (See Appendix IV-G.)

(3) Court Order

Where a local board refuses to obey an administrative order, the Commissioner should be empowered to petition a court (e.g., the Appellate Division) to convert his order to a court order. The

New Jersey Division on Civil Rights has such power under N.J.S.A. 10:5-19, as does the New York Division of Human Rights. (See Appendices IV-H and IV-I.) An analogous provision could be created in the education law. The court order would be appealable, but if the local district did not appeal and disobeyed it, it would be subject to sanctions for contempt of court.

(4) School District Reorganization

In Pennsylvania, another enforcement mechanism is available: School district reorganization. (See Appendix IV-J.) The law gives power to local district boards and administrators and county boards to determine the "appropriate administrative units to be created in each county" in lieu of the 2,000 school districts that existed in Pennsylvania in 1963. But it reserves to the Commonwealth (through its authorized agencies) the power to insure compliance with criteria established by the Legislature where such local officials fail to act or act arbitrarily outside of those criteria. Apparently, then, the State Department in Pennsylvania could itself reorganize school districts if necessary to ensure effective education. Similarly, the Board of Education of New York City has been given the power to divide the city school district into a number of local school districts and subsequently to alter the boundaries of those districts, subdivide one or more of them, or consolidate wo or more parts of two or more districts. (See Appendix IV-K.)

Although there is no analogous provision in New Jersey law, the Supreme Court of New Jersey has held that the broad powers

granted the Commissioner in order to effectuate the policies expressed in the New Jersey Constitution (in, e.g., N.J.S.A. 18A:4-23 and N.J.S.A. 18A:6-9) include the power to merge districts, at least where there is a compelling reason, such as the need to prevent racial imbalance (Jenkins v. Township of Morris School District, 58 N.J. 483, 279 A.2d 619 (1971)). Whether the Commissioner will use his power under Jenkins in other than racial situations is unknown. Specific legislation making available to him the remedy of reorganization where districts are unable or unwilling to comply with the law would clarify his powers and thus add to his arsenal of remedies. However, the reorganization of districts would be impractical and/or ineffective in many situations. It is not the answer to enforcement problems in general.

(5) Receivership

The ultimate sanction should be some form of state action to take over the functions of the noncomplying local board. On the lowest level, the Commissioner could be given the power to remove some or all of the members of the local board and require the selection or election of new members in the manner provided by N.J.S.A. 18A:12-7 and 14-3. Under New York law, any community school board of New York City may be removed in this manner. (See Appendix IV-G.) This enforcement mechanism would have the political advantage of leaving the day-to-day administration of the school district in local hands, albeit new ones presumably better disposed toward complying with the laws.

In the event that this remedy seems likely to be ineffective, the Commissioner or State Board should have the authority to appoint a receiver or petition a court to do so. Although there would clearly be a takeover of local functions, the State Department would not itself have to administer the school district. The New York law governing community school districts also includes this remedy. (See Appendix IV-G.)

In some situations, however, takeover by the State itself might be necessary, and the Commissioner (again, perhaps with the approval of the State Board) should therefore be given the power to assume all the duties and responsibilities of the local board when necessary to remedy deficiencies.[23] The Supreme Court in Robinson seems to have envisioned this ultimate remedy in requiring the State to meet its obligations under the Constitution when the local school systems fail to fulfill their delegated responsibilities.[24]

Besides the New York law referred to above, which also includes this remedy, a New Mexico statute provides a model for legislation giving the Commissioner the remedy of receivership. (See Appendix IV-L.) This statute creates only one form of takeover--assumption of local functions by the state board--and thus does not embody all the possibilities discussed above. Nevertheless, it is worthy of study, particularly for provisions setting up a procedure for the Commissioner to follow in carrying out the remedy.

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23. Under N.J.S.A. 52:27 et seq. and N.J.S.A. 52:27 D-18, the Division of Local Finance in the Department of Community Affairs is empowered to assume operating control of a municipality that is unable to meet its financial obligations. State takeover of local functions is thus not without precedent in New Jersey.

24. See discussion at p. 45, above.

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Conclusion

In order to meet the directive of the New Jersey Supreme Court in Robinson v. Cahill, the Legislature must define thorough and efficient education, provide mechanisms for funding that education and for continuously monitoring the progress of the schools, and give the Commissioner of Education all necessary means to enforce state standards and requirements for all schools.

If the Legislature is to enact laws in all of these areas, it must take a broad and deep view of the goals and functions of public education. The effort involved is massive, but it can be made, and the rewards will be long-lasting. The present study is intended to aid legislators by analyzing the areas in which legislation is needed and by providing them with model statutes and bills from other states. From the sample legislation it can be seen that a number of states have made significant steps in one or more areas. But the New Jersey Legislature has the unique opportunity of creating an overall approach to education that will serve as a general model for states throughout the country.